AFFIN BANK BHD

v.

DATO' MOHAMED EMBONG

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[ORIGINATING SUMMONS NO: 24-28-2001]
12 NOVEMBER 2001

LAND LAW: *Caveat - Removal of - Whether application by way of originating summons proper procedure - Whether applicant an aggrieved party - Whether applicant had locus standi to file application - National Land Code, s. 327(1)*

LAND LAW: *Caveat - Entry of - Whether wrongful - Whether registered proprietor of land entitled to caveat own land - Whether there were circumstances over and above his status as registered proprietor to entitle him to lodge private caveat - Whether pending suit gave rise to a caveatable interest - National Land Code, ss. 323(1), 327(1)*

The defendant was one of two guarantors of a loan granted by the plaintiff to one MAE Sdn Bhd ('the borrower'). The defendant's land was charged as security for the loan granted. The borrower defaulted in repayment of its loan and the plaintiff filed a suit ('the suit') against the borrower, the defendant and the other guarantor. In their defence and counterclaim therein, they alleged that the plaintiff prematurely recalled and cancelled the loan and thereby had caused unnecessary loss and damages to them. They prayed that the loss and damages be set off against the plaintiff's claim. The plaintiff applied for an order of sale of the said land which was sold by way of an auction to a purchaser. It was a condition of the said sale that the balance of the purchase price was to be paid later. Before the purchaser paid the balance of the purchase price, the defendant lodged a private caveat. As a result thereof, the Land Office was unable to issue a certificate of sale to the purchaser. Hence, the plaintiff's application for the removal of the private caveat under s. 327 of the National Land Code ('the Code'), damages for losses incurred by the plaintiff as a result of its entry and the defendant indemnify the plaintiff against any claims that the purchaser of the said land might make against the plaintiff.

Held:

[1] As the said land was not the subject matter of the suit, the proper procedure for removal of the private caveat was by way of an originating summons and not by way of a summons-in-chambers as contended by the defendant. (p 206 e-f)

[2] The stay of proceeding pending appeal of the suit that was allowed was not in respect of the said land. It must be emphasised that the said land was not the subject matter of the suit. Thus, the observations of the Supreme Court of India in *Mulraj v. Murti Rajhunathji* that the court "must stay its hand; if it does not do so, it acts illegally" did not apply. (p 206 g)

[3] The plaintiff was genuinely aggrieved by the existence of the private caveat on the said land because the plaintiff as chargee could not obtain payment of the purchase price nor could it give good title to the purchaser of the said land so long as the private caveat remained on the said land. (p 206 h-i)

[4] The plaintiff under which it was presently known was at all times duly registered under the State of Terengganu Malay Reservations Enactment 1360 and therefore was a lawful chargee of the said land and thus had the *locus standi* under the National Land Code to file this application. (p 207 a-b)

[5] A registered proprietor of land is not entitled to enter a private caveat in respect of his own land unless he is able to establish a set of circumstances over and above that of his status as a registered proprietor. The defendant was a mere registered proprietor of the said land and as such was not entitled to caveat his own land. The lodgment of the caveat was therefore wrongful. The fact that the defendant's proprietorship in the said land had been jeopardised because of the sale and that the said land was the subject matter of a development project could not be considered as circumstances over and above his status as a registered proprietor which gave rise to a distinct interest in the land entitling him to lodge the caveat. (p 208 a-b & e-f)

[6] The pending suit did not clothe the defendant with a caveatable interest in the said land. The counterclaim against the plaintiff for loss and damages as a result of the alleged premature recall and cancellation of the loan had no connection with the said land although the same was a security provided to the plaintiff for the loan it had granted. The pending suit was between the plaintiff and the borrower and

whatever loss and damages arising from the premature recall and cancellation of the loan due from the plaintiff was to the borrower and not the defendant. (p 208 g-h)

[Caveat to be removed; no order as to other reliefs as they were inappropriate to be included under s. 327(1) of the Code.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Development & Realty Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 ***(refd)***

Eu Finance Bhd v. Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener [1989] 1 MLJ 195 ***(refd)***

Kwong Yik Bank Bhd lwn. Official Assignee (as Receiver of the Estate of Gifford, JAH) [1992] 1 CLJ 63; [1992] 1 CLJ (Rep) 474 ***(refd)***

Mulraj v. Murti Rajhunathji [1967] AIR 1386 ***(refd)***

Sharifah Mastura Tuanku Ibrahim v. Wan Aziz Ibrahim [1994] 1 CLJ 298 ***(refd)***

Tan Su Sing v. Haluan Kreatif Sdn Bhd & Anor [1998] 1 CLJ Supp 407 ***(foll)***

United Malayan Banking Corporation Bhd v. Development and Commercial Bank (Ltd Bhd [1983] 1 CLJ 82; [1983] CLJ (Rep) 421 ***(refd)***

Legislation referred to:

National Land Code, ss. 323(1), 327(1)

For the plaintiff - WM Lee (FS Lai); M/s Shook Lin & Bok

For the defendant - Hj Mokhtar Ngah (Mohd Badrol Awang, Azrul Alias); M/s Mokhtar Ngah & Co

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

Application

The plaintiff by an originating summons applied under s. 327 of the National Land Code 1965 (the Code) for the following remedies:

(a) that the private caveat lodged by the defendant against the land held under GM 4252, Lot No. 4348, Mukim of Sura, District of Dungun, Terengganu (the said land) be removed forthwith;

(b) that the defendant pay damages to the plaintiff for the losses incurred by the plaintiff as a result of the entry of the said private caveat;

(c) that the defendant do indemnify the plaintiff against any claims that the purchaser of the said land may make against the plaintiff;

(d) costs.

Background

The plaintiff by a letter dated 23 October 1983 granted a loan of RM1,780,000 to one MAE Sdn Bhd (the borrower). The loan was guaranteed by the defendant herein and another individual. The loan was secured by, *inter alia*, a charge dated 22 March 1984 over the said land and a charge over another property both of which under third party charges created by the defendant herein who was the registered proprietor thereof.

The borrower defaulted in repayment of its loan and the plaintiff filed a suit at the Kuala Terengganu High Court under Suit No. 23-83-86 (the suit) against the borrower and the defendant and another individual for the recovery of the same. In their defence and counterclaim, they alleged that the plaintiff had prematurely recalled and cancelled the loan and thereby had caused unneccessary loss and damages to them. They prayed the loss and damages to be set off against the plaintiff's claim.

As the defendant failed to make any payments to the plaintiff as demanded in the Form 16E, the plaintiff filed an application to the Land Office for an order for sale of the said land.

Consequently, on 19 September 2000 the said land was sold to one Ruslam bin Ali @ Mansor (the purchaser) for RM437,000 at an auction, and it was a term of the conditions of sale that the balance purchase price of RM393,300 (after deducting the 10% deposit of RM43,700) be paid within 90 days from 19 September 2000. At the time of the auction, no private caveat exists on the said land.

At the request of the purchaser, the Land Office had extended the time for the purchaser to settle the balance purchase price to 18 January 2001.

On or about 26 December 2000, the defendant lodged a private caveat on the said land. On 17 January 2001 the plaintiff was notified of the caveat by the Land Office.

On 18 January 2001 the purchaser paid the balance purchase price of RM393,300 to the Land Office.

By reason of the private caveat lodged by the defendant, the Land Office is not able to issue a certificate of sale to the purchaser and hence the plaintiff's application to remove the caveat.

After hearing the parties, I, on 5 September 2001, dismissed the preliminary objections with costs and allowed the private caveat to be removed with costs. I now give my reasons.

Preliminary Objections

At the start of the hearing, learned counsel for the defendant raised four preliminary objections to the application, namely:

(a) Originating summons is not appropriate procedure for the plaintiff's application, and therefore bad in law.

(b) The defendant contends that there is a stay order in respect of the suit, the subject matter of which is the said land. Thus, the court must stay its hand as further proceedings are illegal, and counsel cited Mulraj v. Murti Rajhunathji [1967] AIR 1386 in support.

(c) The plaintiff is not an aggrieved party as the land was successfully sold to the purchaser.

(d) The plaintiff was not capable of being a chargee under the State of Terengganu Malay Reservations Enactment 1360 on 14 March 2001 when the originating summons was filed and thus has no *locus standi* to file the application.

With regard to the objection (a), it is to be noted that, unlike in the application, the said land is not the subject matter of the suit. Therefore, the proper procedure for removal of a private caveat is not by way of a summons-in-chambers as contended by the defendant's counsel but by an originating summons, as was clearly held in the case of *Tan Su Sing v. Haluan Kreatif Sdn Bhd & Anor* [1998] 1 CLJ Supp 407 which was referred to by the learned counsel. The counsel's contention on this issue can only be correct if the said land is the subject matter of the suit, which is not in this case. Thus, the originating summons is the proper procedure and therefore right in law.

The objection (b) is misconceived. The stay of proceeding pending appeal that was allowed is not in respect of the said land but was in respect of the dismissal of the plaintiff's and the defendant's applications in their respective pleadings. It must be emphasised that the said land is not the subject matter of the suit. Thus, the observations of the Supreme Court of India in the case of *Mulraj* that the court "must stay its hand; if it does not do so, it acts illegally" does not apply.

Respecting the objection (c), I agree with learned counsel for the plaintiff that the plaintiff is genuinely aggrieved by the existence of the private caveat on the said land because the plaintiff, as the chargee, cannot obtain payment of the purchase price nor can it give good title to the purchaser of the said land so long as the private caveat remains on the land (see *Kwong Yik Bank Berhad lwn. Official Assignee (as Receiver of the Estate of Gifford, J.A.H.)* [1992] 1 CLJ 63; [1992] 1 CLJ (Rep) 474).

Regarding the objection (d), learned counsel for the defendant withdrew the objection. However, it is to be noted for record that the Malay Reservations Enactment (Amendment of Second Schedule) Order 2001 which came into force on 14 March 2001 wherein the Malay Reservations Enactment 1360 has been amended by substituting "Perwira Affin Bank Berhad" with the words "Affin Bank Berhad". Thus, it is clear that the plaintiff under which it is presently known, is at all times duly registered under the Enactment and therefore is a lawful chargee of the said land and thus has locus under the Code to file this application.

By reasons of the matters aforesaid, I therefore found that the defendant's preliminary objections had no merits and as such, I dismissed them with costs. The court then proceeded to hear the application on its merits.

Contentions Of The Parties

It is the submissions of learned counsel for the plaintiff that the defendant being the registered proprietor of the said land has no *locus standi* to caveat it under s. 323(1) of the Code. The fact that there is a pending suit does not clothe the defendant with a caveatable interest. In any event, the pending suit is between the plaintiff and the borrower and whatever loss and damages due from the plaintiff is to the borrower and not the defendant.

Learned counsel for the defendant, on the other hand, contends that the defendant has an interest in the said land over and above his status as the proprietor. His proprietorship in the said land has been jeopardised because of the sale and further, the said land is the subject matter of the development project.

Findings Of The Court

I, with respect, find much merit in the plaintiff's counsel's submissions.

The plaintiff's application herein is filed under s. 327(1) of the Code which provides:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

The plaintiff, being a chargee and a body aggrieved by the existence of a private caveat, is therefore entitled to file the application for its removal under s. 327 of the Code (see *United Malayan Banking Corporation Bhd v. Development and Commercial Bank (Ltd) Bhd* [1983] 1 CLJ 82; [1983] CLJ (Rep) 421 FC.)

The private caveat lodged by the defendant over the said land was purportedly made under s. 323(1) of the Code. However, it has been established by case law, which I respectfully agree, that a registered proprietor of land is not entitled to enter a private caveat in respect of his own land (see *Eu Finance Bhd v. Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener* [1989] 1 MLJ 195; *Asia Commercial Finance (M) Bhd v. Development & Realty Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109), unless he is able to establish a set of circumstances over and above that of his status as a registered proprietor (*Sharifah Mastura bte Tuanku Ibrahim v. Wan Aziz Ibrahim* [1994] 1 CLJ 298).

The Form 19 and statutory declaration in support of the defendant's application to lodge a private caveat disclose that the ground for the defendant's application is that pending the determination of the parties' liability in the suit, the said land ought not be transferred to any other party. Thus, this begs the question, as to whether the fact that the plaintiff's and the borrower's suit against one another is still pending constitutes a set of circumstances over and above that of his status as a registered proprietor, thereby justifying the lodgement of the private caveat.

In my judgment, the defendant in the present case, was a mere registered proprietor of the said land and as such, he was not entitled to caveat his own land. The lodgement of the caveat was therefore wrongful. Neither, there was any set of circumstances over and above his status as registered proprietor which affirmatively gave rise to a distinct interest in the land to entitle him as a registered proprietor to lodge a private caveat on the said land. The fact that the defendant's proprietorship in the said land had been jeopardised because of the sale and that the said land was the subject matter of the development, in my view, cannot be considered as circumstances over and above his status as registered proprietor which gives rise to a distinct interest in the land entitling him to lodge the caveat.

The pending suit does not clothe the defendant with a caveatable interest in the said land. The counterclaim against the plaintiff for loss and damages as a result of the alleged premature recall and cancellation of the loan has no connection with the said land although the same was a security for the banking facilities provided to the plaintiff by way of a third charge, as the pending suit, as rightly pointed out by the plaintiff's counsel, is between the plaintiff and the borrower, and whatever loss and damages arising from the premature recall and cancellation of the loan due from the plaintiff is to the borrower and not the defendant.

Thus, the private caveat lodged by the defendant was not one which had been properly and validly lodged in the first place and as such, I ruled they ought not be allowed to remain any longer. Hence, I ordered the caveat to be removed forthwith with costs.

However, I made no order in respect of reliefs (b) and (c) as I found they were inappropriate to be included on an application under s. 327(1) of the Code which only provides powers for the removal of private caveats by the court. They ought to be tried separately.